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STATEMENT OF QUESTIONS PRESENTED

The following questions are presented by the Petition for Writ of Certiorari:

1. Whether a search warrant is sufficiently particular to authorize the executing officers to intercept telephone calls made to the premises during the course of the search where it contains the following authorization: "If you there shall find that . . . bookmaking and/or lottery is being conducted, take into your possession all property . . . used as a means of carrying on [that] illegal practice."

2. Whether the Sixth and Fourteenth Amendments are respected in prosecutions for lottery and bookmaking where State's witnesses testify as to the contents of telephone calls received in the defendant's premises during the course of a warranted search

OPINION BELOW: JURISDICTION:

CONSTITUTIONAL PROVISIONS INVOLVED

The respondent (State) adopts as its own the recitations under the above headings which the petitioner has included in his petition for writ of certiorari.

STATEMENT OF CASE

The indictments were tried before Judge Rizzi and a jury on November 7, 8, 12 and 13, 1968. The State introduced the testimony of five witnesses: the four State Policemen who participated in the raid and another State Police detective who testified as to his investigation prior to the raid and also testified as an expert on gambling

practices. In essence the testimony of the State's witnesses was that Apartment No. 411 was entered by breaking open the door. The defendant was found on his knees on the kicthen floor beside two buckets of discolored water, with one or both hands in the buckets. State Police detective Daniel J. Novak testified that the discoloration of the water in the buckets over which the defendant was kneeling was caused by the dissolving of water-soluble paper. The defendant was led into the living room, the search warrant was read to him, and he was advised of his right to remain silent.

In the kitchen there were two telephones; one was off the hook, the other ringing, and near them was a package of water-soluble paper. Novak answered the ringing telephone and answered a total of about fifteen calls during the raid. Trooper S. Lipski was assigned to take telephone calls and answered about 30 calls over a period of one to one and one-half hours. The callers, some of whom were anonymous, relayed betting information. State Police Detective Sergeant Justin Dintino, a man of sixteen years police experience, and at the time of the trial assigned to the State Police Intelliegnce Bureau, testified that on the "bank level" in the numbers system it is not unusual for a caller of a bet to omit his name because, and that as a result of daily contact, the listener knows his callers' voices.

Several items of property seized were introduced into evidence, including horse racing and football schedules with notations of results but no recording of bets. Investigator Novak and Trooper Lipski testified, over defense objections, as to the substance of the telephone conversations to the effect that the callers were seeking gambling information or placing bets. No defense testimony was introduced.

ARGUMENT

POINT I

A search warrant which provides that "if you there shall find that . . . bookmaking and/or lottery is being conducted, take into your possession all property . . . used as a means of carrying on [that] . . . illegal practice" is sufficient in its particularity to meet the standard of the Fourth Amendment, and is sufficient to authorize the executing officers to intercept telephone calls made to the premises during the course of the search.

Under the circumstances of the instant case, *i.e.*, the peculiar crime of bookmaking and the nature of the instrumentalities incident to its perpetration, the search warrant which issued was proper under the principles of federal and local law in both its form and execution. Recognizing the Fourth Amendment proscription against general searches to be irreproachable in purpose, *see, e.g.*, Lord Camden's opinion in *Entick v. Carrington*, 19 Howell St. Tr. 1029 (1765), discussed in *State v. Bisaccia*, 45 N.J. 504 (1965), nevertheless, the issue as to whether a search meets that standard must be resolved on the particular facts of the case; "there are no rigid rules." *State v. Daniels*, 46 N.J. 428, 436 (1966).

The scope of a search warrant is delimited by two sets of criteras; namely, description of the premises, and description of the items to be seized. Admittedly, both of those mandates are imposed because of society's determined effort to protect privacy from capricious invasions which might result if the scope of initially necessitated searches were left to the subjective discretion of zealous

law enforcement personnel. *See Stanford v. Texas*, 379 U.S. 476, (1965) (which added that when literature is seized because of contained ideas, it must be described with "scrupulous exactitude").

With respect to the consideration of description of premises, state and federal cases recognize:

> It is enough if the description is such that the officer with a search warrant can, with reasonable effort, ascertain and identify the place intended.
>
> See, *e.g.*, *Steele v. United States*, 267 U.S. 498 (1924); *State v. Daniels, supra*, at 436.

The element of description of things to be seized would appear to be controlled by the same standard. *See, e.g., State v. Seefeldt*, 51 N.J. 472 (1968), where the Court, with respect to a description in a search warrant, held that the words "'weapons used in the crime of murder' . . . were of adequate specificity to eliminate any room for the exercise of discretion by the searcher as to the items to be seized". *Id.* at 490.

The defendant draws in issue the general sufficiency of the description of the items to be seized and the particular inclusion within the warrant's language of telephone calls. The doctrines discussed above venerate the sufficiency of the warrant on both issues. See, *e.g., State v. Masco*, 103 N.J. Super. 277 (App. Div. 1963), relying upon *Steele v. United States*, 267 U.S. 498 (1924) and *Stanford v. Texas*, 379 U.S. 476 (1965), which held that the description "bookmaking paraphernalia" was not only sufficiently precise, but also that:

> A telephone is an indispensable facility for a bookmaker . . . and as such obviously must be included

> in the description. . . . In this search for evidence to establish defendant's complicity in the crime they could lawfully receive such calls.
>
> *State v. Masco, supra,* at 283.

The *Masco* decision tacitly recognizes that every crime has its personal accoutrements, which, depending on the situation, may or may not be described with a single word. Although a gun may be aptly described by the word gun, unfortunately the instruments of bookmaking may not of necessity have that same intrinsic identifiability. It is important that the words used conjure a sufficient Gestaldt in the minds of the executing officers. The rule of the Fourth Amendment is "reasonableness," *State v. Daniels, supra,* at 437, and it is not to be measured by "formalisms of no vital importance." *Id.*

Because the officers were authorized to seize the particular telephone calls related to bookmaking, they were indeed authorized to intercept all calls which came into the apartment during the circumscribed time incident to their search. That was as much a part of the authorized scope of the search as "cellars, broom closets, hallways, storage areas" are within the authorized scope of a search warrant directing the search of "such areas as are under the custody and control of a superintendent of . . . building . . .". *Cf. State v. Sheppard,* 46 N.J. 526 (1966). See also *State v. Carbone,* 38 N.J. 19, 22 (1962).

Within this framework it cannot be said that the interception of the defendant's telephone calls violated either the letter or spirit of *Berger v. New York,* 388 U.S. 41 (1967), or *Katz v. United States,* 389 U.S. 347 (1967). Here we have, as contradistinguished from the facts in those cases, a narrowly circumscribed "surveillance" – if that term is appropriate here – which was authorized by a

Superior Court judge who was notified of the need for the search. *Katz*, 389 U.S. at 354. Moreover, the case at bar does not present a surreptitious eavesdropping which was the subject of the Court's consternation in those decisions.

Point II

In prosecutions for lottery and bookmaking testimony of police officers as to bets placed by telephone callers to the defendant's premises are admissible as non-hearsay extra-judicial statements offered to prove the calls as operative facts.

In bookmaking and lottery prosecutions testimony as to incoming telephone calls received by police officers during the course of a search have been traditionally admitted into evidence. See, *e.g.*, *State v. Masco*, *supra*, at 283, and the cases cited therein. Although less than explicit as to the justification and theory of admissibility, those decisions comport with sound evidential theory.

The defendant wrongly characterizes the testimony of the police officers as hearsay; that is, as extra-judicial statements offered to prove the truth or falsity of the facts asserted which deny the accused the right to confront his accusers. *McCormick, Law of Evidence*, 460 (1954); *New Jersey Rule of Evidence* 63. Properly construed, the calls were offered to prove the calls themselves as operative facts. When viewed in light of that purpose, the evidence is without the proscription of the hearsay exclusion. *McCormick*, *supra*, at 463. See, *e.g.*, *Commonwealth v. Wiswesser*, 134 Pa. Super. 488, 3 A. 2d 983 (1939) (testimony as to defendant's agent to juror not hearsay in a prosecution for solicitation of juror). Indeed, this concept is embodied in

annotation to *New Jersey Evidence Rule* 63 prepared by the Rules of Evidence Study Commission. It provides:

> Evidence that the owner of a car gave instructions to a driver is not hearsay if offered to prove agency; but it would be hearsay if the content of the instructions related to delivery, and were offered to prove delivery.

To interpose: evidence that a hopeful bettor gave a bet to a bookmaker is not hearsay if offered to prove bookmaking; but it would be hearsay if the content of the message related to a specific horse-race and were offered to prove the existence of same. See also *Fentron Architectural Metals Corp. v. Romagnino*, 69 N.J. Super. 410 (App. Div. 1961), *cert. den.*, 36 N.J. 297 (1962).

CONCLUSION

The decisions below rested upon both prevailing constitutional doctrine as well as specific local decisions which have considered the problems with not only constitutional sensitivity but with greater particularity. Accordingly, on the basis of the authorities advanced as applied to the record below the respondent prays that the petitioner's Writ of Certiorari be denied.

Respectfully submitted,

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